United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May 27, 2008

TO : Cornele A. Overstreet, Regional Director

Region 28

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Lori Irish and Advanced Architectural

Metals, Inc., alter egos

Case 28-CA-21812

The Region submitted this case for advice as to whether the Employer's state court lawsuit was unlawful under Bill Johnson's. We conclude that the charge should be dismissed, absent withdrawal, because, based on the Region's investigation the Employer's lawsuit cannot be considered "objectively baseless" and thus unlawful under Bill Johnson's, as recently construed by the Board in BE & $\overline{\text{K.}^2}$

FACTS

As background, the long-running dispute involves Respondent Advanced Architectural Metals, Inc.'s (AAM) creation of alter ego entities and the siphoning to them of metal fabrication and metal installation work in order to avoid its bargaining obligation to its production and installation employees' Union, Carpenters Local 1780. In the process, as found by late Judge Gontram in his January 26, 2007, decision, 3 the Employer violated Section 8(a)(1), (2), (3), and (5), prompting unit employees to go on strike. As Judge Gontram held, during the two-day strike and after its termination, Irish repeatedly threatened employees, their familes and others with bodily harm and death. 4 Subsequently, in the most recent ALJD, Judge Kocol concluded that Irish discharged Charging Party Mark

¹ Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

 $^{^{2}}$ BE & K Construction Co., 351 NLRB No. 29 (September 29, 2007).

 $^{^{3}}$ JD(SF)-01-07 (2007 ALJD).

 $^{^4}$ <u>Id</u>. at 10-12. Irish has made such threats against other individuals involved in her ongoing legal disputes.

Parmenter, Sr. and his son Mark Parmenter, Jr. because Parmenter, Sr. refused to give false testimony at a Board hearing. As support for an alter ego finding, Judge Kocol noted that "largely uncontested" evidence established that, among other things, Irish gave Parmenter, Sr. title to a truck in November 2006 as payment for work he performed for her, and subsequently demanded its return.⁵

On March 4, 2008, the second day of the hearing in the above case, Parmenter, Sr., who was to testify on behalf of counsel for General Counsel, was served with a summons and complaint in a state court lawsuit filed by Irish and AAM against Parmenter, Sr., Parmenter, Jr., and a business owned by Parmenter, Sr.⁶ The lawsuit alleges that Parmenter, Sr. converted Irish's truck by taking possession of it after forging Irish's signature on a transfer of title. The lawsuit also alleges that Parmenter, Sr. slandered Irish when he reported to the Las Vegas police that Irish threatened him with death. Finally, the complaint alleges that Parmenter, Jr. libeled Irish [FOIA Exemptions 6, 7(C), and 7(D)

.]

ACTION

We conclude that the charge should be dismissed, absent withdrawal because, based on the Region's investigation, the Employer's lawsuit cannot be considered "objectively baseless" and thus unlawful under $\frac{\text{Bill}}{\text{Johnson's}}$, as recently construed by the Board in $\frac{\text{BE}}{\text{E}}$ & K.

Under <u>Bill Johnson's</u>, the Board may enjoin as an unfair labor practice the filing and prosecution of a state court lawsuit only when the lawsuit: 1) lacks a reasonable basis in fact or law; and 2) was commenced with a retaliatory motive. 7 In <u>BE & K Construction Co.</u>, the Board clarified that there are no circumstances in which a reasonably based lawsuit could be an unfair labor practice,

 $^{^5}$ JD(SF)-19-08 (2008 ALJD), slip op. at 6-7. The Region confirms that the signature on the title appears very similar to Irish's uncontested signature on other documents.

⁶ Case No. A558272, filed March 3, 2008 in District Court, Clark County, Nevada.

⁷ <u>Bill Johnson's</u>, 461 U.S. at 748-49.

regardless of the motive for initiating the lawsuit. 8 A lawsuit cannot be deemed baseless unless its factual or legal claims are "plainly foreclosed" 9 such that "no reasonable litigant could realistically expect success on the merits." 10

Here, we cannot conclude now that Irish's lawsuit is baseless under the Board's legal test. The conversion count will be decided on whether a trier of fact credits Irish's claim that Parmenter, Sr. forged her signature on the transfer of title. Although Irish has been found not to be credibile in other circumstances generally, we cannot say presently, as a matter of law, that no reasonable litigant could ever realistically expect success on this claim. 11 The slander claim similarly rises and falls on a credibility resolution between Irish and Parmenter, Sr. concerning the alleged death threat. Although Parmenter, Sr.'s allegation concerns behavior that is similar to Irish's behavior elsewhere, we cannot conclude that this similarity alone forecloses Irish's claims. Finally, the libel claim is dependant on whether Irish had a reasonable basis for believing that Parmenter, Jr. made the disputed allegation [FOIA Exemptions 6, 7(C), and 7(D)

.] Without knowing the basis for Irish's mistaken belief, we cannot conclude here that her assertion is plainly foreclosed.

Accordingly, and for the above reasons, the charge should be dismissed, absent withdrawal.

B.J.K.

⁸ <u>BE & K Construction Co.</u>, 351 NLRB No. 29, slip op. at 6.

⁹ <u>Id</u>., slip op. at 10.

 $^{^{10}}$ Id., slip op. at 7.

¹¹ However, should the Board adopt Judge Kocol's conclusion that Irish gave Parmenter, Sr. the truck in payment for work performed, Irish's maintenance of this claim could be preempted.